Supreme Court of the United States

OCTOBER TERM, 1970

In the Matter of:

RICHARD O. J. MAYBERRY,

Petitioner,

vs.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

Docket No. 121

Place Washington, D. C.

Date December 17, 1970

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Washington, D. C.,

Thursday, December 17, 1970.

The above-entitled matter came on for argument at 11:50 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

APPEARANCES:

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Counsel for Petitioner

CAROL MARY LOS, ESQ.,
Assistant District Attorney
Allegheny County, Pennsylvania
Counsel for Respondent

- - -

PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear arguments in No. 121, Mayberry vs. Pennsylvania. Are counsel ready?

Mr. Reitz, can you conveniently, without discommoding yourself, present a section of your argument now in about seven minutes?

MR. REITZ: I will try, Your Honor.

ARGUMENT OF CURTIS R. REITZ, ESQ.,

ON BEHALF OF PETITIONER

MR. REITZ: Mr. Chief Justice, may it please the Court. I think it is fortuitous that the morning ends with a case that involves a different kind of speech. We have here a criminal contempt case, arising from Pennsylvania, which is, in my research, unprecedented in the law of criminal contempt. We have a defendant who was on trial in 1966 under two very serious charges for prison breach and for holding hostage in the course of a prison breach, charges which had a potential of life imprisonment under the second of those charges.

The trial lasted twenty-two days, twenty-two trial days. It spreads from November 7 until December 22 on the calendar. During those twenty-two days, the defendant and two co-defendants were representing themselves on these very serious charges. At the conclusion of the trial, after the jury verdict had been brought in, on the twenty-second day, the trial judge opened the next session of court on Monday morning

and excoriated all three defendants, summarily convicted them of criminal contempt, and held that as to eleven separate days, although there were multiple incidents involved, that petitioner Mayberry had been guilty of criminal contempt.

On each one of those eleven charges, as he recited the facts as he recalled them, he imposed a sentence of a minimum of one year and a maximum of two years in state prison. After each one of those sentences, following the first, he directed that each one of those sentences would be served consecutively.

So that the first of his imposition of sentence was a sentence in aggregation of eleven years at a minimum and twenty-two years at a maximum for criminal contempt.

Q Clarify for me, if you will, Mr. Reitz, the relationship of these sentences collectively to the sentence on the substantive charge.

A He then proceeded, Mr. Chief Justice, to sentence on a substantive charge, and he gave a sentence for prison breach of ten years, which was the maximum -- five years minimum, ten years maximum, which was the maximum permitted by the statutes of Pennsylvania for prison breach.

Q Now, is that consecutive?

A That was also consecutive. He then imposed a sentence of thirty years maximum, fifteen years minimum for the charge of holding hostage. The aggregate of all of that was

forty years on the substantive crime and twenty-two years for criminal contempt, or a new sentence of sixty-two years, with a thirty-one year minimum. That was the sentence imposed that morning.

I am told, although I have not seen the document itself, that a few days later he reversed the order of sentencing so that the -- although he started that Monday morning with the criminal contempt sentence and then followed with the substantive crimes, that he directed the sentence on the substantive crimes, the forty years, be served first, and then the twenty-two years for criminal contempt. But the net effect of the sentencing that morning was twenty-two years for criminal contempt, forty years for substantive crimes, sixty-two years total.

I am aware of no criminal contempt sentence which comes even within a long distance of that sentence. There have been many studies made of criminal contempts over the years; none of them reflects a sentence that is even one-seventh as great for any kind of criminal contempt.

In that same session the judge sentenced the two co-defendants also for criminal contempt on exactly the same methodology. He has this per diem method and it was two years for each day on which he found a criminal contempt had been committed. The sentences on the co-defendants were somewhat shorter. There were six days in the case of one

defendant, and seven days in the case of another.

Q Would you say that their conduct was as aggravated with respect to this petitioner?

A In some instances, Your Honor, the conduct I would think would be substantially worse. One of the co-defendants verbally threatened the life of the judge, which never happened in the case of petitioner Mayberry. Some of the obstreperous disruptive conduct on the part of one of the co-defendants seems to me to have been substantially worse from reading the record.

The eleven contempts found against petitioner Mayberry involve nine counts, nine charges of what I have described as purely verbal epithets directed at the judge. They were quite brief. They are printed in total in the appendix. They range in seriousness over a considerable variety of hyperbole.

Q I take it you would agree that these were very aggravated episodes of conduct and utterance, would you not?

A They would be conduct, Your Honor, which from any attorney I think would have been thought of as very aggravated. In the instance of a layman defending himself, a non-educated layman defending himself in a very serious court, with the kind of background from which he comes and the life which he had led, I don't think I would have put the label "aggravated" on the verbal conduct.

Q Even after repeated warnings, you wouldn't

concede this was aggravated?

A The warnings were repeated, Your Honor, but the incidents, for example, were late in the trial. One of the two-year sentences is imposed for the defendant more or less expostulating in anger after having been prevented from developing a line of questioning that he was not arguing for fools. The judge inferred from that, I think relatively properly, that the defendant was referring to the judge as a fool. For that he got two years in jail.

Q You would concede, I suppose, that the conduct of the defendant throughout his trial is wholly outrageous, would you not?

A It is conduct which we certainly would not condone.

Q I don't mean every moment of the trial, but that it was considerably quite outrageous, wouldn't you? I mean, don't we begin with that hypothesis?

A I would not use the word "outrageous," Your Honor, because I can read --

Q Well, he called the judge a stumbling dog, he called him a son-of-a-bitch, he called him -- those are two I happen to remember, from reading the briefs, and he called him a good many other things.

A He did indeed. He had some rather exotic terminology.

Q He had some powerful language.

A But I think the level of outrage one develops in this kind of case depends a good deal on what one finds to be the level of expectation from the speaker.

MR. CHIEF JUSTICE BURGER: I think we will suspend here, Mr. Reitz.

(Whereupon, at 12:00 noon, the court was in recess, to reconvene at 1:00 o'clock p.m., the same day.)

AFTERNOON SESSION

1:00 p.m.

MR. CHIEF JUSTICE BURGER: Mr. Reitz, go right ahead.

ARGUMENT OF CURTIS R. REITZ, ESQ.,

ON BEHALF OF PETITIONER--RESUMED

MR. REITZ: May it please the Court, before we recessed for lunch, we had explored a bit of the factual history of this case and had begun some discussion of the seriousness of the verbal conduct under which the trial judge in this case sentenced the petitioner to so many years in jail.

I think it is fair to say that it is perfectly obvious that the judge himself took a very serious view of the conduct of petitioner; indeed the sentence alone indicates that he viewed it as the most serious contempt case of all time. His verbal description both in the charge to the jury and in his sentence of the petitioner and his co-defendants confirms that.

What adjective one might say is adequate to describe the conduct, and I think that will depend on many points of view, it is perfectly clear that the case was treated as a very serious case and I would not urge the court that this conduct was either meritorious or even to be condoned.

What I do urge on the Court, and I think this is the critical point, and it is underscored by whatever view of seriousness one takes, the procedure employed in handling this case was grossly disproportionate to the seriousness of the

crime, even if one views it as a rather petty crime.

The amount of procedural due process afforded to this petitioner in handling this case was nil.

Q Was it basically any different from the procedural due process that he had in the trial of the substantive charges?

A Oh, indeed, Your Honor. On the substantive charge, he had notice, he had the right to counsel, he had the right to make preliminary motions, including a motion to disqualify the judge.

Q What have they done about counsel in a substantive case?

A In the substantive case he had waived counsel. He had insisted on the --

Q More than that, he rejected, didn't he?

A He had indeed. He insisted on his right to try himself in that case, which is permitted under the Constitution. But he was afforded the right to counsel. Counsel was offered to him and indeed, despite his waiver, the trial judge appointed the public defender to serve as an advisor to him during the trial, and he was present throughout the trial and available for resource.

There was a jury. There was evidence produced. There was time for argument, not only on the issue of guilt but on the issue of mitigation of sentence. The full panoply of a

trial was followed in the case of the substantive crime. None of it was followed in the contempt case.

Q May I ask this, Mr. Reitz: Is it your submission that the real vice here is the disproportion in terms of procedure or disproportion in terms of penalty?

A I think they go together, Your Honor. If the sentence in this case had been in the tradition of sentences for court room decorum a few days or a few dollars, as happened, for example, in the Fisher vs. Pace case, that this Court reviewed many years ago, the amount of procedure that we traditionally have required in that kind of a case is rather slight. And indeed if the judge does, as in the Fisher case, impose or threaten to impose the sanctions during the course of the trial, the procedural requisites follow from the necessary situation.

In this case, we have an obviously much different situation of a very serious crime in the mind of the judge, and it seems to me the nature of the penalty quite reinforces the total absence of any process.

There was no opportunity in this case to do many of the things that the Commonwealth in the brief suggests petitioner did not do. He did not have an opportunity to challenge the judge. He did not have an opportunity to waive counsel. He did not even have an opportunity to ask for counsel. It was suggested that he might have moved after the fact to

modify sentence. When one looks at the record as to what happened that Monday morning, on December 22, after the judge had finished imposing the 22 years of sentence on petitioner, he asked to be allowed to speak, and the judge refused to hear a word. At that stage the judge would have none of his further participation in the court room proceedings. So the absence of his own advocacy at that stage, to which the Commonwealth alludes, seems to be quite irrelevant.

In addition --

Q Is the full record in the Court?

A It is indeed, Your Honor, the entire stenographic transcript is here. We have printed only a small portion in the appendix.

Q Well, it is a long trial, wasn't it?

A It was a trial that lasted for 22 trial days, the last day being entirely sentencing, so it is a fairly long trial. There were something in excess of 3,000 pages of stenographic transcript in the trial.

In addition to the fundamental due process argument, we make a separate argument which is in some ways even more basic, and that was the opportunity -- petitioner was denied the opportunity to make any statement in mitigation of punishment in this case.

Q Wouldn't that have been somewhat ceremonial here?

A It might indeed have been ceremonial because of the obviously overwrought state of the trial judge. With an impartial tribunal, I am not convinced that a fairly substantial argument could not have been made in mitigation of the severity of the conduct.

Q Of the conduct or the sentence?

A Of the conduct.

Q How could you mitigate the conduct? What explanation could possibly even approach justification?

A As you study the record, Your Honor, I don't think one would need to approach justification in order to find there were indeed issues of provocation or explanation that might in some way have tempered the fury. The defendant in this case, for example, attempted several times to introduce evidence that went to his conduct immediately after he was apprehended. The prosecution in the case in chief had put on a witness who testified that after he was apprehended he had still resisted very forcefully the arresting officer and with a fight that took place going down the stairs in the hospital in which he was apprehended.

Petitioner several times attempted to introduce evidence that would have contradicted that, the witnesses who would have denied that he was then in that state of flagrant resistance. Every time he tried to produce that evidence, he was thwarted by objection on the part of the District Attorney,

without explanation, and objection sustained. In the face of this --

Q I suppose that meant that the trial judge simply was taking the position that there was no evidence that could bear by way of mitigation or explanation of his conduct during the course of the trial. I suppose that the trial judge had the benefit of Illinois vs. Allen at that time. He might well have removed this man from the court room after his second outburst but, of course, this was tried long before Illinois vs. Allen was --

A Yes, this was tried in 1956.

Q Yes. I wonder if our real problem isn't the severity of the sentencing. Frankly, that is the way it would seem to me, and I started out on that theory and then maybe I diverted you from it.

A No, Your Honor, I have not the slightest doubt that there is an enormous problem here with the severity of the sanction. It is so far out of keeping with any of the customary standards to which we have looked in the past for sentencing a contempt case that it simply looms as an unacceptable judicial act.

Q Mr. Reitz, suppose we would agree with you in that proposition, what could we do about it?

A That is the major difficulty with the point, Your Honor. We do not have in Pennsylvania, we do not have in

the federal statutes a statutory maximum on sentences. So far as the statute is concerned, the sky is the limit. We have, and I have attempted to collect in the brief, a series of benchmarks to which one could look for some sort of a ceiling to be imposed from the outside on what a sentencing judge can do.

Q Well, what would --

A We have many statutory ceilings, none over six months.

Q What would the constitutional provision be to which we would rely?

A The constitutional provision on which we rely on the brief, Your Honor, is the Eighth Amendment prohibition of cruel and unusual punishment.

Q That is the only one you think would be applicable so far as this Court's power to do anything about this case?

A I believe so, Your Honor. One might try to make a substantive due process argument, but I don't think that gives us any greater prevision as to the limitations that one could impose through the Constitution on state trial judges.

Q Well, certainly, at least, we can't do what we did in the Eighth in this case, can we?

A You're quite right. This Court lacks the supervisory power, it lacks the normal very broad appellate review

that the Court has exercised on numerous occasions in reducing what it felt to be mild excesses by comparison on the part of federal trial judges. The eleven consecutive counts -- concurrent counts in the Yates case impressed the Court as being grossly disproportionate to the offense in that case, and the Court was able through supervisory power to deal with that problem.

Q Well, if we decided that you were right on your constitutional argument, what would be the mechanism to deal with it, to undertake to deal with it ourselves or to remand it for reconsideration in calmer atmosphere?

A I think, Your Honor, if this Court finds that the cruel and unusual punishment or the substantive due process argument has merit, some guidance would have to be created as to the outside limits that would be committed for this type of sentence. A remand of the Pennsylvania Supreme Court, which had already faced this issue and rejected it, with one dissenting justice, is not likely to generate the kind of standards that one would need for a national constitution.

Q Well, aren't the state courts capable of applying the federal constitutional provisions that you rely on? What is different about their approach -- I am not speaking of the instant case, in terms of the action, I am speaking of establishing standards -- shouldn't they be established in the state courts in the first instance?

A There is great virtue to that in some instances, and many of the scholars of federal jurisdiction urge that in the ultimate the only basic safeguards for all constitutional rights are state courts, that all federal courts' jurisdiction is subject to statutory limitation by Congress. But in this instance we are in, I think, such a brand new area with cruel and unusual punishment standards that unless the Court is able to provide some reasonable guidance to state courts, my expecta- would not be that the results would be very happy in the first instances.

Q May I ask, Mr. Reitz, does the Pennsylvania Supreme Court have the power comparable to our so-called supervisory power which I guess what we used in the Yates case? In other words, could that court have reduced this sentence?

A Pennsylvania courts take a very narrow position on their power to review sentences generally. Their law of contempt is relatively unformed. This is the first case of which I am aware in which the Pennsylvania Supreme Court has ever faced an in-court contempt problem.

Q Do I correctly infer from Justice Jones' treatment of the question as to whether the sentence constitutes cruel and unusual treatment, that that is the only way this was put to the Pennsylvania Supreme Court, that they did constitute cruel and unusual punishment?

A That argument was put. That was not the sole

argument put.

Q Well, I notice the opinion doesn't seem to address itself to any other basis for the challenge to the sentence. I am looking at page 14 of the record.

A In the Pennsylvania Supreme Court, all of the arguments that are before this Court were raised in one fashion or another. Mr. Mayberry there represented himself. The court appointed an attorney to represent him also who filed a brief, and they raised between them every issue that is now before this Court.

Q Mr. Reitz, didn't Justice O'Brien assume in his separate opinion that there was something in the nature of supervisory power that imposed duty on the Supreme Court of Pennsylvania to examine the sentence for contempt?

A Well, Justice O'Brien relies on the cruel and unusual punishment argument. He is persuaded that in comparison with the statutory maximum for a whole raft of offenses, including second degree murder, being less than the sentence imposed on this defendant for conduct which bears no resemblance to the atrocious assaults and homicides, that bear a lesser statutory maximum, that the sentence was impermissible. Since he was a lone Justice on that issue, he was not forced to face the issue of what remedy could be provided.

Q What is your view of that opinion?

A I think an argument can be built on the basis of

existing data that a maximum of six months is a customary standard that is now so well entrenched by statute and case law that it is the outside limit for a sentence in a contempt case absent a statute permitting a longer one. All the statutes stop short of that. Many, as I have indicated, stop far shorter in terms of hours or days for such punishment.

Q If the judge had made all these sentences concurrent, one with another -- there were eleven, weren't there?

A There were eleven.

Q -- made them concurrent, would you be here?

A Yes, indeed, Your Honor, I think we would.

Q That is two years on each, was it?

A Two years on each, and that is still twice as long as the Yates case, which was one year eleven times concurrently, and that is still in my judgment an enormously overbroad sentence for the kind of contempt that this record contains. It is only because of the fact that the multiplier of eleven is added that the seriousness of that first sentence can be lost sight of. A two-year sentence is itself one of the most severe in the whole catalogue of criminal contempt sentences.

Q Suppose they had, instead of sentencing him for contempt, preferred a charge against him under legislative enactment which provided that a person who interfered with the court in a serious manner, as this man had, and attempted to

stop it, be guilty of a crime, had tried him, indicted him, tried him before a jury, given him a lawyer, given him all the protection that could be afforded, would you still argue as seriously as you do now that that would violate the cruel and unusual punishment charge?

A If the same sentence were imposed as a result of that?

Q Yes.

A And the statute provided for a crime of obstructing justice?

Q That's right.

A I would not make the argument, Your Honor. Indeed, I make the point in this case --

Q Well, that is really the basis of the complaint, isn't it, not the cruel and unusual punishment statute?

A Well, Your Honor, in this case the Pennsylvania contempt statute provides a limit requiring obstruction of justice. The first nine counts in this case to me cannot be brought within the language of obstructing justice.

Q Yes, but --

A They were insulant and discourteous, but they were not in any way blocking the advance of the trial.

Q But it is treated as contempt. Suppose it is just treated as any other crime, where you want to punish a man for doing something seriously wrong, they should fix his

punishment at 25 years, and he had stood up in this Court, for instance, and tried to disturb this Court and had to be taken control of, and had interfered with the Court and put foul names against them. Would you think 25 years that a legislative department would be committing -- violating the cruel and unusual punishment to say that that is so serious?

A Your Honor, I take a very different view, if we have a legislature having faced the question and establishing a statutory parameter to the permissible sentences. In this case we have no such legislative judgment to which either the state judges or this Court can look.

Q Well, I suppose the legislative judgment is to put no limit on it. You do have a statute in Pennsylvania, it appears on page 2 of your brief, and I suppose the Pennsylvania Legislature would be assumed to be aware of the action of the legislatures in many other states, they have put various limitations on it, and this one didn't. Isn't that a legislative judgment?

A Your Honor, that statute was passed in 1836.

Q Whenever it was passed.

A It has not been reviewed since. I think all of the statutes in which there do appear statutory maximum have been of more recent vintage than that. There has been nothing prior to this case in which the Pennsylvania Legislature or any other legislature could be given notice of the enormous

extension of customary power to which a trial judge might go.

Q What you are doing is talking about a case where the same judge that is a witness to it, who is assaulted by it, who is called horrible names, tries the case, is not a separate crime where he is put before another jury, with a jury of his peers, given a lawyer and given all the protections of the due process of law, as I understand -- what I understand due process to provide, which is a trial in a court room by an unbiased judge and an unbiased jury.

A I could not agree with you more, Your Honor.

Q On the other hand, Mr. Reitz --

A The requirement --

Q -- if in this summary procedure the conclusion of this trial, the judge for all of his contemptuous behavior had summarily sentenced the fellow to three days in jail, would you find that objectionable or in violation of any constitutional right?

A No, Your Honor, I would not. I would accept as so well grounded in our law of criminal contempt that a judge has within that very narrow range of customary penalties the kind of restraint that this court referred to many years ago in the Anderson case, that that is not -- that can be handled without the full panoply of a trial.

Q Where do you draw the line? Where would you undertake to draw the line?

A Well, I would suggest in the --

Q In reducing this 22 years?

A I suggested in the brief that a place to stop is the place this Court stopped in the Bloom case in regard to the right to jury trial. I do not think that is the right place to stop. I do not subscribe to that. There was, of course, no jury trial.

Q Do you make that argument now?

A In light of the DeStefano case, Your Honor, I think it would be futile to make that argument now. I think the line has to be drawn at a very low level, at the point where the number of days -- and I would think it is number of days -- reaches beyond the stage where we can tolerate the total absence of anything we call a trial, and that it seems to me has to be very short and has to come within, I think, very well recognized ancient limitation.

Q Well, just to test it for size, suppose he gave him 60 days on the first offensive conduct, would you think that was acceptable?

A I would not, Your Honor.

Q And then when it was repeated, he gave him another 60 days and continued that right through, then he would have, what, 22 months, wouldn't he? Would you be here then?

A Yes, indeed. I think that is the point at which

certainly a trial becomes quite relevant. An impartial judge and the opportunity to make the necessary defense and --

Q Then let's stop, let's go back. The first misconduct occurs after the jury has left the room for the day and he calls him in and sentences him to 60 days for that offensive conduct. And you would concede there is no other process necessary, I take it. Now, two days later he repeats that and the judge repeats the same process. You mean that after the first few bites they are all free?

A No, Your Honor, I would not even concede on the first 60 days.

Q You wouldn't?

A 60 days is a --

Q A jury trial for a 60-day --

A No, no, no. A trial, Your Honor. This Court has drawn the limit of jury trials for the moment of six months. It seems to me that at least one can say that six months is the line that which one is clearly now entitled to a trial. I think that is a necessary, almost a priori argument from the Bloom decision itself. But it seems to me that it is way below six months before one can say that you have a penalty that is so trivial, so much a reprimand, so much within the ambit of where contempt is traditionally a line of discipline of lawyers. If one looks at contempt cases, it is the lawyers who are usually the defendants in contempt cases. In

those cases the remedies are, as the appendix and our brief indicate, extremely short, a matter of one, two, or three days. And in that range I think the custom is now well established that a judge can impose that kind of sanction and I would not attempt to persuade the Court to change that now. But 60 days is well beyond that, well beyond it.

Q Of course, this gentleman wasn't a lawyer. He was acting like one, but it may be that penalties, some penalties might be sufficient to deter lawyers whose jobs sometimes depend on their acting like lawyers, but this gentleman was representing himself, I suppose.

A Well, this Court has faced -- and I think well resolved -- the problem of deterrence of persons who would disturb the court room in the Allen case. There are many devices which can be used that do not involve the imposition of criminal punishments, summarily imposed by the judge, that can be used for deterrence. This is not the only deterrent.

Q You recall that in Illinois vs. Allen, the contempt was specifically reserved in Justice Black's opinion?

A The power to cite for contempt, not the power to impose a contempt sentence, and I think, as Justice Black's opinion makes clear, that citation is a notice which requires a subsequent trial, a trial at which the defendant, as Justice Black noted, could again be disorderly. But I read nothing in the Allen case that would justify summary imposition of

criminal punishments under the heading of contempt.

Q Unless it were three days?

A In the Allen case, that is true, Your Honor.

Q But your reservation before was that if it were three days, you would think that was all right.

A I would indeed. I would indeed.

MR. CHIEF JUSTICE BURGER: Very well. Thank you. Miss Los?

ARGUMENT OF CAROL MARY LOS, ESQ.,

ON BEHALF OF RESPONDENT

MISS LOS: Mr. Chief Justice, and may it please the Court. We were originally of the opinion that the entire trial transcription should be printed in the appendix for the Court because we felt that only by reading the entire transcript could this Court get some idea of the feelings and the tensions and the pressures that existed throughout this long five-week trial. Unfortunately, going through the trial transcript, we realized that by the court stenographer merely taking down the words that happened, that so much missed the court stenographer or could not be taken down simply in the method of words that this Court could not feel simply from a cold record the tensions and the pressures that existed that day, or the response that the petitioner was able to evoke, not only from his co-defendants or from the jury, but from the spectators who were in the court room at the time. Apparently it seems to

me that the petitioner might be able to take advantage of this cold record and deny first of all that he is extremely intelligent and articulate a man; and, secondly, that he was not the ring leader but the instigator of all of these contempts.

This, if I may just for a few moments recap some of the events of the trial that might not necessarily be printed in the trial record. This was the second trial that had begun on these charges. The first ended in a mistrial when the petitioner alleged that a prospective juror had seen him handcuffed to a sheriff. A mistrial was granted and the petitioner boasted at this time that he would never be brought to trial on these charges, that if all else failed he would break out of jail.

He threatened the prosecutor and stated that the prosecutor would never see him come to trial on these charges for prison breach. But these weren't idle threats. Mayberry had previously broken out of the Eastern Penitentiary in Pennsylvania, the Western Penitentiary in Pennsylvania, the Graterford Prison he attempted a prison breach, and during the course of his trial he was able to break out of the Allegheny County Jail. This prison breach occurred almost in the middle of this particular trial, at the time -- it occurred on a weekend -- the petitioner and his two co-defendants, as well as three other inmates of the Allegheny County Jail, broke out, kidnapped a city police officer who was on duty at the

time, and were able to get a good distance from the city before they were captured.

It was only because the gun which they had secured from the police officer misfired that a police officer was not killed at close range. As I said, this occurred during the course of the trial and does not necessarily appear as a matter of record. But in any event, petitioner from the start was deemed to be a very dangerous individual, and the court room understandably contained a great number of sheriff's deputies.

The trial began before Judge Fiot and Mayberry, as has been said, of course, before, decided that he wanted to act as his own attorney and refused the help of counsel appointed for him. Counsel nonetheless appeared throughout the trial and was there at the sentencing for contempt citations.

Mayberry requested from the trial judge that he be permitted to come to side bar whenever he wished, and the trial judge refused this, first of all I believe because Mayberry was a very dangerous individual and a search of Mayberry's legal papers during the trial revealed that he had placed sharpened razor blades inside of his legal pad. Secondly, one of the co-defendants had been throwing pencils at the judge during the trial. So certainly there is reasonable grounds to believe that the judge himself might have feared that his life was in danger. There was a bodyguard specially assigned to the prosecutor after the threats of petitioner became so numerous

across the counsel table. These again are not recorded in the trial transcript because the court stenographer was not within hearing range.

Nonetheless the request for side bar was refused. Mayberry started a series of taunts to the judge which continued throughout the trial. His attitude was this: I want an explanation that satisfies me right now, and if I don't get it, I am not going to continue with this trial.

For example, a very good example I think occurred at the end of the trial when he closes to the jury. He is told that he will only be permitted an hour to close. At the end of the hour he is given an additional 15 minutes; Mayberry decides that he wants just to continue his closing to the jury and he refuses to heed the judge's warnings, is taken out of the court room and another co-defendant is permitted to close.

When Mayberry was brought back in again, he gets up and starts closing to the jury again and is again taken out of the room. So that the trial judge attempted on several occasions, using different methods -- he had him taken out of the room at least ten or eleven times, when brought back Mayberry proceeded the same way as when he had left off, when he was taken out of the room. He was bound and gagged, but unfortunately he was able to shout through the gag and pound on the floor. His shoes and the shoes of his co-defendants were removed. He still raised such a ruckus that the trial judge

was unable to talk to the jury.

Now, when Mayberry would direct one of his assaults to the trial judge, petitioner's brief would have you believe that nothing really happened except the judge said continue on with your questioning. What happened precisely was this: Mayberry was greatly amused by the fact that there were loud gasps in the court room, that the jury was shocked, that some of the spectators were shocked, he would burst out into this loud laughter, which was followed by his co-defendants who would hoot, holler and applaud and stamp their feet. In fact, the reason we say that Mayberry was the ring leader here was that when he would return to his seat, he would lean across to the prosecutor and say now watch this and would stand up and repeat something.

Q There were two co-defendants, Miss Los?

A Yes, there were, Your Honor.

Q And were they cited for contempt?

A Yes, they were. What Mayberry did was he would lean to them and say now it is your turn, or he would repeat something, if one of the men would get up, he would give him a nudge in the side and the co-defendant would spring up and direct some abuse to the judge.

Q And they were both found guilty of criminal contempt, were they?

A All three of them were, Your Honor, yes.

Q And what happened to their cases in the Pennsylvania courts?

A They did not take the cases on appeal, Your Honor.

Q The co-defendants?

A That is true.

Q What sort of sentences did they get?

A They got one- to two-year sentences, precisely as Mayberry had, only they were not cited for contempt as many times. I believe one was cited six times and the other was cited for seven different occasions.

Q So they got six to twelve and seven to fourteen respectively?

A I believe that is true, yes, Your Honor.

Q And no appeal?

A I do not believe that there was an appeal taken, at least not to my knowledge.

Q Is this very graphic picture you're giving us, is that what one gets from the record or were you at the trial yourself?

A No, I was not at the trial, but I have had benefit of talking with the prosecutor on numerous occasions and again I was in law school at the time of this trial, but there was a great deal of publicity and in fact this was a case of some notoriety at the time.

Q This was in Pittsburgh?

A Yes, Your Honor, in Pittsburgh, in Allegheny County.

Incidentally, after Mayberry would nudge one of his co-defendants and ask him -- indicating to them to stand up and raise some ruckus, he would then, after they had done something rude to the trial judge, he would stand and ask for a mistrial and when that was denied he would ask for a severance on the grounds that he was prejudiced by the jury about what one of his co-defendants had said.

There was also in the back of the court room a small group of men who were later identified as being inmates, who were either out on bond or were released from prison, who were known to Mayberry, and after he would direct something to the judge he would turn around and laugh toward them, they would again applaud and stamp their feet so as to create such a disturbance --

Q There were penitentiary inmates in the back of the court room and the judge couldn't put them out?

A Oh, no, Your Honor, they were removed from the court room. But what I am saying is that the purpose of his remarks to the judge were not just to excoriate the judge; the purpose was to create sufficient ruckus so that there would be a delay in the trial.

Q Was there -- from what you said, this was a

pretty notorious trial, I gather -- has there been any effort in the legislature to get legislation through to deal with this kind of business?

A I am not aware of any. I know that -- of course, none in the interim period has passed. I cannot say with any certainty that there has been legislation proposed.

As I said, binding and gagging didn't do any good. And at first the judge was really in a sense not saying anything to Mayberry about his contumacious conduct in front of the jury. I think very honestly that he felt that he didn't want to prejudice Mayberry in front of the jury for citing him for contempt, and again Mayberry was acting as his own counsel. So for the judge to have the jury leave the court room and cite him specifically might not have served the purpose or it might only have the end result have Mayberry so enflamed as to continue this course of conduct probably even in a more serious vain and eventually cause the trial to stop.

And we are -- of course, we will almost concede that we are concerned about the eleven to twenty-two year sentence. It does, in view of previous contempts that come before this Court, seem rather severe. We maintain, however, that the actions of Mayberry here were so outrageous and so outlandish that they far exceed anything that has come before this Court.

Q How are we really supposed to -- if these facts are relevant to that judgment, how are we supposed to get them

before us when they aren't in the record?

A Yes, that is, I think, the major difficulty for this Court doing anything to lessen the sentence. I think the only course that can be entertained at this point, if you feel that 11 to 22 years is cruel and unusual punishment --

Q Habeas corpus?

A -- is to remand on habeas corpus, Your Honor, to hold a hearing to determine all the relevant facts that must come before this Court can determine that 11 to 22 years was unjustified.

Q Well, Pennsylvania has a state post-conviction proceeding?

A Yes, we do, Your Honor.

Q I suppose it would have to go there and not the federal in the first instance?

A Yes, that's true, we do have a vehicle to deal with this.

Q Well, what do you suppose the purpose of giving these contempt sentences was? Certainly it wasn't to control the trial, was it?

A No, because certainly they were given after the trial. I think the purpose --

Q Was it to deter Mayberry from ever doing anything like this again?

A Well, I think that might have been one of the

ends. I think secondly, though, because the case did have a great deal of notoriety, because of the fact that a lot of inmates at the penitentiary or prisoners who were out on bail or who were out on bond or who had not yet come to trial, were watching this closely, as evidenced by the great number of people who came into the court room and the number that had caused a commotion along with Mayberry. I think the purpose was to show that a man cannot do this and get away with it, and the fact that there was so much notoriety, I am sure the trial judge realized that the prisoners and those coming to trial would watch very closely to see how Mayberry was dealt with.

Q Miss Los, why shouldn't -- or do you think it is the least bit sensible to suggest that the judge thinks that an act in a court room is so serious that it justifies the two-year sentence that he must not try it himself if he is going to wait until after trial?

A I think the question here ought to be what should he have done in 1966. I think in 1966, under due process standards, as the Pennsylvania court interpreted them, and as the Pennsylvania Supreme Court interpreted them, relying on In Re Oliver, the trial judge had the absolute right to sentence the petitioner as the hearing judge.

Q But you know that whenever -- isn't it the rule that when it appears that a judge is so personally involved in and so insulted by a contemptuous act that he shouldn't be the

one to try the contempt?

A Certainly if the remarks are directed personally to him. It is our belief --

Q Some of these statements are pretty personal.

A Yes, Your Honor, but the purpose of them, I think, and I think the trial judge was able to see this, was directed toward stopping the trial. It wasn't directed toward the --

Q When a judge reacts so strongly to having a personal remark directed at him that he gives the man two years for it --

A But that is an assumption we're making, Your Honor. I think he felt that the administration of justice and that the proper handling of this trial was insulted so to speak.

Q Does Pennsylvania have any contempts occur in the court room that require handling before another judge? Does Pennsylvania have --

A No, Your Honor, the statute is set forth for you. This is the --

Q You know, the federal rules make a distinction.

A Yes, Your Honor, we have a distinction of that sort. No, Your Honor, we don't. But my only answer to that really is, and I honestly feel that the judge himself didn't feel these were personal attacks upon his own character. I

think he understood them in the context of what Mayberry was attempting to do.

Q Let me ask you -- let's assume that the trial was had today on the same events in Pennsylvania. Let's assume the same trial took place and these same events happened today.

A Then I think we have a completely different ball game because we are then bound by the ruling of this Court that if the sentence can exceed six months, certainly giving one to two --

Q What is the reason for saying that the judge, if he wants to give more than six months he has to have a jury, what is the reason for that?

A I think the severity of ths sentence, Your Honor. I believe it is the feeling of this Court --

Q What is the reason for it? What is the reason for having the jury at all?

A I think because there a man's right to be tried by his own peers where a serious sentence is involved, where a serious crime is involved, overrides the administration of justice. In other words, the affrontery to the court which should be dealt with by the judge himself. Now --

Q Excuse me, ma'am. I didn't mean to interrupt you.

A I was just going to say we will not deny that this is a serious offense, but we must talk in terms of 1966

standards and not 1970.

Q Well, I am not talking about a jury. I am talking about another judge.

A I don't feel as if another judge should have to hear this case because it is my firm belief that while certainly the phrase "a stumbling old dog" were directed toward the judge or "I am not going to argues with fools," meaning the judge, I think the purpose was clearly understood.

Q Do you find any basis in anything you have discovered in the cases for saying that a judge chooses not to exercise his contempt power when episodes in the court room occur but to postpone the whole thing until after the trial, that what he is dealing with in the absence of a state statute is a single offense?

A No, Your Honor. The reason why I feel here that this was not just one continuing offense, these were separate offenses --

Q I understand that is the way they were treated.

A Yes.

Q But they were not dealt with at the time by the judge during the course of the trial, perhaps for a very good reason.

A First of all, the sentencing was not given out until the end of the trial. The petitioner and his co-defendants were warned repeatedly by the trial judge. In fact, at one

point judge called counsel before him and expressly asked counsel to go through the possibilities of contempt and the actions of their client, because he felt that they should be well aware that their actions were contemptuous.

Now, the fact that he waited until the end of the trial I think was done solely to protect the petitioner and his co-defendants, so that the petitioner wouldn't become, first of all, so enflamed and so enraged that he would stop the trial by means of letting the jury know, and getting so out of hand that the trial couldn't continue.

I think that since his purpose here was to protect the petitioner, and certainly to protect the Commonwealth's right to see the case through to its just end, that the petitioner cannot now say, well, the judge couldn't do at the end of trial what he could do in the middle of the trial.

Q Miss Los, assuming that some people would consider these violent verbal attacks as assaults, if he were charged with that he would have gotten his jury, wouldn't he?

A If he had requested a jury, yes, Your Honor, that is true.

Q Is Mr.Reitz correct, that twenty years is the sentence for second-degree murder in Pennsylvania?

A Yes, ten to twenty years, Your Honor, yes, for second degree.

Q And this man has 22.

A Your Honor, we're talking here about an affront-
ery to public justice and not to one individual. We're talking
about a man disrupting the orderly administration of justice,
affronting the dignity and order in the court --

Q You're talking about the judge trying him after
the man called him a stumbling old dog or something.

A That is true, but I fully believe that the judge
understood that Mayberry's purpose in doing this was not direct-
ed toward him as such but only because Mayberry's chief purpose
was to stop the trial.

Q How in the world could he know that and how in
the world do you know that he knew that?

A I believe he knew that, Your Honor.

Q Well, we believe it. I agree with that.

A For these reasons: First of all, as I say,
Mayberry had threatened several times and boasted that the trial
would never reach its completion. Secondly, he --

Q But that is not in this record, right?

A Because it was not part of testimony, Your Honor.

Q Well, we deal with what we have before us, don't
we?

A Right, and that is why I am asking you --

Q I am not for a moment not agreeing that you're
telling the truth, but I mean the point is that we have got a
record here.

A And that is why I respectfully ask that if you feel this is cruel and unusual punishment, that you remand it for hearing so that all the facts can be put before the court because as the record stands, it is a very cold record and as excerpted it appears as if Mayberry might have been justified for some of the comments that he made. I think that it so distorts what actually happened in the trial that this Court cannot make a determination as to whether or not that was actually cruel and unusual punishment without a complete hearing on what actually occurred.

Q When you talk about a complete hearing, are you suggesting a complete hearing in a due process sense of a trial before a jury or before another judge?

A No, I am not, Your Honor, because I still believe that 1966 standards must apply and as such in 1966 Pennsylvania law, the interpretations by the state of Pennsylvania relying on In Re Oliver were that a judge could sentence summarily without due process safeguards that are now essential, for example in a serious crime, and we will concede that 22 years is a serious offense.

Q Did you have any idea that this man had been indicted by a jury, appointed lawyer for him, given him a full trial like anybody else gets who is charged with a crime, that there would have been any difficulty of getting him convicted?

A Absolutely none, Your Honor.

Q In a fair and impartial trial?

A Absolutely no difficulty. I think absolutely he would be convicted.

Q He would have had a chance then to get an unbiased judge and an unbiased jury?

A Thatmay very well be true, Your Honor, but I don't think that vitiates the proceeding that we had here. I think the judge did have an absolute right to sentence, as he did summarily --

Q Suppose he had sentenced him to life?

A I think he had the right under the -- absent cruel and unusual punishment, absence that argument, I think he absolutely had the right to do that.

Q Well, I agree with you as to the seriousness of the crime fully. I have no doubt about that. I don't worry about punishment for 22 years for trying to disturb and destroy the possibility of a court proceeding. The only thing I am worried about in the case is that the judge tried him without his having that which a man charged with a serious crime ought to have, and that is a trial by an impartial judge and according to due process.

A If he was entitled to a trial at all, Your Honor, I disagree with you that he was. I think the judge had the right because the administration of justice was affronted.

Q Yes.

A I feel that in 1966 --

Q Well, that is going back to the thing as to whether it is retroactive.

A Yes, Your Honor, and I think that we must judge this in terms --

Q You wouldn't think so now, would you?

A Oh, no, certainly not now, Your Honor.

Q But if we remand, as you intimated might be one solution, is the case going to be tried under 1966 standards or 1971 standards?

A I think it only fair that if we are going to judge what a trial judge did in 1966 under those standards, that he do it in terms -- that the hearing be done in terms of what was the law in Pennsylvania at that time.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Miss Los.

I think your time is consumed, Mr. Reitz, unless you have something of high urgency, and we would give you a little bit of time for that.

ARGUMENT OF CURTIS R. REITZ, ESQ.,

ON BEHALF OF PETITIONER - REBUTTAL

MR. REITZ: I want to make just one point, Your Honor, and that is on the issue of retroactivity that has been discuss. Miss Los has testified at some length to a matter which is not in the record, which of course not -- her testimony

could not even be part of the trial on a remand. It is to me a shocking thing to hear in any court in 1970 a suggestion that even in 1966, no matter what one views the law in 1966 to be, that it would raise any question that a man is entitled to a trial on a punishment that could produce 22 years of sentence.

MR. CHIEF JUSTICE BURGER: Professor Reitz, you acted at our request and by our appointment in this case and, on behalf of the Court, I thank you for your assistance to your client and to the Court.

MR. REITZ: Thank you, Your Honor.

(Whereupon, at 1:55 o'clock p.m., argument in the above-entitled matter was concluded.)

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